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For the Northern District of California  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
AFFYMETRIX, INC., a Delaware corporation, No. C 03-03779 WHA  
Plaintiff and Counterdefendant,  
v.  
MULTILYTE LTD., a British corporation,  
Defendant and Counterclaimant.  
/

**ORDER MODIFYING  
PROTECTIVE ORDER AND  
VACATING HEARING**

In this patent action, Multilyte now moves to resolve a dispute arising from an alleged violation of the stipulated protective order. Mr. Steven Lendaris, a fourth-year associate at Heller Ehrman was assigned to review confidential documents produced by Affymetrix. Between March 14, 2005 and March 31, 2005, he reviewed approximately 50,000 pages of customer emails, approximately 12,000 pages of laboratory notebooks, and approximately 1,000 pages of “device master record” documents (Lendaris Decl. ¶¶ 2–3). The problem is that Mr. Lendaris also prosecutes patents relating to arrays for analyte detection.

As typical of most patent litigation, the parties entered into a stipulated protective order on February 9, 2004, which was adopted with modifications by order dated February 17, 2004. The Court only retained jurisdiction for 45 days after final termination of this action; final judgment was entered on June 23, 2005. Nonetheless, the parties jointly requested and received an extension to file a motion by August 11, 2005.

There is no dispute that the materials produced by Affymetrix was sensitive technical information designated “Confidential, Attorneys’ Eyes Only.” The stipulated protective order provided that only “Qualified Persons” could review such confidential documents. Paragraph

1 4(b)(i) expressly provided that “any person who is currently involved, or whose job  
2 responsibilities make them likely to be involved in the future, in the preparation or prosecution  
3 of patents or patent applications directed to arrays for analyte detection are excluded from the  
4 definition of ‘Qualified Persons.’” There was no explicit provision to describe the  
5 consequences of having prosecution counsel review materials covered by the protective order.

6 Good cause having been shown, the protective order is now **MODIFIED** to provide that:

7 (1) Any person who has reviewed confidential materials subject to this  
8 protective order is barred from prosecuting patents directed to making  
9 or using “nucleic acid arrays” for a period of 24 months after his or her  
last review of confidential Affymetrix materials; and

10 (2) Any person who has reviewed confidential materials subject to this  
11 protective order is barred from prosecuting any patent applications  
12 directed to making or using “nucleic acid arrays” that claim a priority  
date before March 31, 2005, until after December 31, 2007.

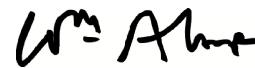
13 This order clarifies that “directed to” means that the subject matter of the patented  
14 invention relates to nucleic acid arrays. In other words, Mr. Lendaris is free to prosecute other  
15 biotechnology patents wherein arrays for analyte detection are not part of the invention; this  
16 specifically includes the four patent applications that Mr. Lendaris is currently prosecuting for  
17 Genentech, previously identified by Heller Ehrman in a letter dated April 6, 2005:

18 10/028,072 (Publication No. 20030004311)  
19 10/052,586 (Publication No. 20020127584)  
20 10/216,162 (Publication No. 20030100709)  
21 10/197,942 (Publication No. 20030077742)

22 In addition, Mr. Lendaris must agree in writing to abide by the foregoing and to never use any of  
23 Affymetrix’s confidential information for any purpose. The Court does *not* retain jurisdiction to  
24 further enforce this protective order. This order is without prejudice to Affymetrix filing suit in  
25 state court should any disputes concerning this protective order arise in the future. The hearing  
26 on this motion, currently scheduled for **SEPTEMBER 8, 2005**, is **VACATED**.

27 **IT IS SO ORDERED.**

28 Dated: September 1, 2005

  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE